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In the Supreme Court of the United States

OCTOBER TERM, 1992

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UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND
CALIFORNIA STATE BOARD OF EQUALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The right of the United States to invoke the cause of action for "money had and received" to recover taxes and other funds unlawfully held by the States or others is a "long-established right" (*United States* v. *Wurts*, 303 U.S. 414, 416 (1938)). This cause of action is available to the United States whether the defendant has received federal funds directly from the United States or through an intermediary or other third party. See, *e.g.*, *Gaines* v. *Miller*, 111 U.S. 395, 397 (1884); Pet. Br. 16-17. It authorizes recovery by the United States of federal funds that have been "wrongfully, erroneously, or illegally paid." *United States* v. *Wurts*, 303 U.S. at 415. Applying "the usual principle that Federal law fashions

remedies for recovery of funds or property of the United States—including those from invalid tax exactions" (*City of New Orleans* v. *United States*, 371 F.2d 21, 28 (5th Cir.), cert. denied, 387 U.S. 944 (1967)), courts consistently have held that the United States may invoke the federal common law cause of action for "money had and received" to recover unlawful state taxes paid by the United States directly or through its contractual reimbursement of federal agents or contractors.[1] See, *e.g.*, *United States* v. *Benton*, 975 F.2d 511, 513 n.1 (8th Cir. 1992); *United States* v. *Broward County*, 901 F.2d 1005, 1008 (11th Cir. 1990); *United States* v. *DeKalb County*, 729 F.2d 738, 741 (11th Cir. 1984); *City of New Orleans* v. *United States*, 371 F.2d at 28.[2]

[1] The United States was contractually obligated to reimburse the federal contractor in this case for all sales or use taxes imposed by the State (J.A. 141-143, 150-151, 169) and was thus the real party in interest with respect to the taxes at issue.

[2] In each of these cases, the United States had agreed to reimburse a federal contractor for taxes imposed by the States. Contrary to the suggestion of the *amici* States (Br. 7), the taxable entity in the *Broward County* and *DeKalb County* cases was not the United States but was a financial institution that held title to buildings in which the United States possessed an interest. See 901 F.2d at 1006; 729 F.2d at 740. In *City of New Orleans*, the City had successfully argued in the contractor's suit in state court that the United States, not the contractor, was the taxable entity. When the United States then brought suit in federal court to recover the tax, the City changed its position and argued that the contractor was the taxable entity. The Fifth Circuit held that the City was estopped from changing its theory, but concluded that the United States could recover the tax unlawfully imposed on its contractor under the federal common law cause of action for "money had and received." 371 F.2d at 28.

In this case, the court of appeals did not question that federal common law establishes a cause of action for the United States to recover federal funds used to pay unlawful state taxes.[3] Instead, the court held that the quasi-contractual federal cause of action for money had and received applies only to "classic cases of unjust enrichment" (Pet. App. 9a) and that, since "the United States has failed to [comply with state-law refund] claim filing requirements" (*id.* at 14a-15a), "there has been no showing of classic unjust enrichment that would justify the use of a federal common law claim for money had and received" (*id.* at 14a).

Respondents and amici do not attempt directly to defend the stated rationale of the court of appeals. That rationale is incorrect for the reasons discussed in detail in our opening brief (Pet. Br. 12-28), which will not be repeated here.[4] Instead of relying on the

[3] Respondents err in suggesting (Resp. Br. 8 n.1) that the court of appeals concluded that there is no federal cause of action for money had and received by which the United States may recover invalid state tax assessments. The court of appeals expressly acknowledged that federal common law affords a cause of action for recovery of unlawful state taxes paid by the United States when the tax has resulted in "unjust enrichment" of the State (Pet. App. 9a-10a). The court concluded in this case, however, that, because the United States had not pursued available state tax refund procedures, the unlawful state tax assessment did not constitute "classic unjust enrichment" and that the federal remedy *therefore* was not available (*id.* at 9a-10a, 14a-15a).

[4] As we explain in our opening brief (Pet. Br. 18-21), the quasi-contractual federal cause of action for money had and received is subject to the six-year statute of limitations established in 28 U.S.C. 2415(a) for claims "brought by the United

reasoning of the court of appeals, respondents and amici seek to support its judgment on theories that were *not* adopted by that court. The additional theories offered by respondents and amici to support the decision below are equally unavailing.

1.a. Respondents acknowledge that, under the federal common law cause of action for money had and received, the United States may recover state taxes that violate its sovereign immunity or that unconstitutionally discriminate against federal contractors.[5]

States * * * upon any contract * * * implied in law" (*ibid.*). It is not subject to additional or conflicting state-law statutes of limitation or other procedural requirements. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. 414, 416-417 (1940); Pet. Br. 19.

We acknowledge that the United States did not follow the State's tax refund procedures in this case—including the State's administrative claim filing requirement and its 90-day suit commencement requirement. But, for the reasons discussed in the text and in our opening brief, those state-law requirements are inapplicable to maintenance of the federal common law cause of action for recovery by the United States of unlawful state taxes. While failure to follow the state procedures would be fatal to a state-law refund claim, the claim of the United States is based on federal, not state, law and is governed by federal, not state, rules of procedure and statutes of limitations. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. 343, 351 (1939).

[5] Respondents state that, if a state tax violates the "tax immunity of the United States, there should be no doubt that a quasi-contract cause of action would arise in favor of the United States" (Resp. Br. 5). Respondents do not discuss whether, in that situation, the claim of the United States would be subject to the state-law procedural requirements applicable to the state-law tax refund cause of action. They appear, however, implicitly to accept the basic premise of our submission, which is that when the claim of the United States

Respondents claim, however, that this federal cause of action is available *only* when the state tax "interfere[s] with the performance of federal functions" or infringes the sovereign immunity of the United States (Resp. Br. 5, 6). Respondents assert that, when a state tax assessment is unlawful only under state law—and does not violate the Constitution or statutes of the United States—federal common law provides no remedy for recovery of the unlawful tax by the United States (*ibid.*).

The obvious flaw in respondents' contention—apart from the fact that it is contradicted by the case law (see Pet. Br. 24-25 & n.16)—is that, when the United States officially commits and disburses federal funds, it is *necessarily* performing a "federal function." In the present case, for example, the contractual obligation of the United States to reimburse its contractor for state taxes was in furtherance of an undertaking that is specifically authorized and directed by federal statute—the management and development of the Naval Petroleum Reserve. See Pet. Br. 3 n.1. As this Court stated in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (quoting *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943) (citations omitted by the Court)):

> When the United States disburses its funds or pays its debts, it is exercising a constitutional

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arises under federal common law, it is not circumscribed or limited by state procedures, "state statutes of limitations," or "state notions of laches" (*Board of County Comm'rs*, 308 U.S. at 351), and the federal courts are not "restricted to the remedies available in state courts in enforcing such federal rights" (*id.* at 350).

> function or power. * * * The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. The duties imposed upon the United States and the rights acquired by it * * * find their roots in the same federal sources.

For this reason, as the Court has now concluded on several occasions, in the "absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Ibid.*

The applicable federal common law standard, as described by this Court in *United States* v. *Wurts*, is that the United States may recover federal funds that have been "wrongfully, erroneously, or illegally paid" to the States or others. 303 U.S. at 415. This federal standard has its roots in the common law rule that an action for "money had and received" is available for recovery of money paid for "duties or taxes erroneously or illegally assessed" (*City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 731-732 (1866)). While federal courts may look to federal *or* state law to determine whether a specific tax is "unlawful" or has been "erroneously" assessed, the cause of action for the recovery of federal funds used to pay such a tax arises under federal common law.[6] *United States* v. *Wurts*, 303 U.S. at 415-416.

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[6] Here, as in analogous examples of federal common law (see *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-352), the federal courts may "borrow" state law in determining whether the state exaction is "unlawful" or "erroneous" and thus meets the requirements of the federal cause of action for recovery of federal funds by the United States. See P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, *The Federal Courts and The Federal System* 768 (2d ed. 1973):

> The federal "command" to incorporate state law may be a judicial rather than a legislative command; that is, it may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should "govern" a given question, state law furnishes an appropriate and convenient measure of the content of this federal law.

Accord, P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *The Federal Courts and The Federal System* 862 (3d ed. 1988).

It is "Federal law [that] fashions remedies for recovery of funds or property of the United States—including those from invalid tax exactions" (*City of New Orleans* v. *United States*, 371 F.2d at 28). See also *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *United States* v. *Michigan*, 851 F.2d 803, 810 (6th Cir. 1988).[7]

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[7] In *United States* v. *Little Lake Misere Land Co.*, 412 U.S. at 593 (quoting Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 410 (1964)), the Court stated that "the right of the United States to seek legal redress for duly authorized proprietary transactions 'is a federal right, so that the courts of the United States may formulate a rule of decision.'" Respondents contend (Resp. Br. 8-9) that the Court's statement in the *Little Lake* case has no bearing on this case, because the validity of the State's tax depends solely upon state law and does not stem from the "duly authorized proprietary transactions" of the United States. Respondents' contention, however, ignores the fact that operation of the Naval Petroleum Reserve *is* a "duly authorized proprietary transaction" of the United States. Respondents also ignore this Court's statement in *Kimbell Foods* that, "[w]hen the United States disburses its funds or pays its debts, * * * [t]he duties imposed upon the United States and the rights acquired by it" are, "[i]n absence of an applicable Act of Congress," "for the federal courts to fashion

b. Amici similarly contend that federal common law cannot create a cause of action when "only the correct application of state tax law is at issue" (Am. States Br. 17),[8] arguing that there must be "an identifiable federal interest" or a "uniquely federal interest" for federal common law to apply (*id.* at 19). But, as this Court concluded in *United States* v. *Wurts*, 303 U.S. at 416, the interest of the United States in preventing and remedying unlawful dispositions of its own funds necessarily concerns "an identifiable federal interest" that supports application of federal law. "No statute is necessary to authorize the United States to sue in such a case" (*id.* at 415), and federal courts are therefore authorized "to fashion the governing rule of law according to their own standards" (*United States* v. *Kimbell Foods, Inc.*, 440 U.S. at 726 (quoting *Clearfield Trust*, 318 U.S. at 367)). See also *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Bayne* v. *United States*, 93 U.S. 642, 643 (1877) (cause of action for money had and received permits the United States to recover federal funds unlawfully held by others); *City of New Orleans* v. *United States*, 371 F.2d at 28 (same). The fact that, in appropriate circumstances, the federal courts may look to state law to determine *whether* the State's possession of federal funds is unlawful does not alter the federal character of the underlying cause of action.[9] See note 6, *supra*.

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* * * according to their own standards" (440 U.S. at 726 (quoting *Clearfield Trust*, 318 U.S. at 366-367)).

[8] "Am. States Br." refers to the brief filed by the States of Arizona, *et al.*

[9] Moreover, as discussed in our opening brief (Pet. Br. 21-22 n.13), proper application of the State's law to the facts of this case requires an interpretation of the federal management contracts made between WBEC and the United States. Issues of federal law, as well as state law, must therefore be addressed in this case in determining whether the State's possession of the federal funds is lawful (*ibid.*).

c. Respondents and amici further err in contending (Resp. Br. 5-6; Am. States Br. 6, 19; Am. Council Br. 7-8 & n.3)[10] that this Court's decision in *United States* v. *New Mexico*, 455 U.S. 720 (1982), points to a contrary conclusion. The question addressed in *New Mexico* concerned the circumstances under which federal contractors are, or are not, immune from state taxation. As we note in our opening brief (Pet. Br. 25-26 n.16), that question is not at issue in this case. We do not contend in this case that the federal contractor is constitutionally immune from the State's tax. Instead, we contend that the State has erroneously and unlawfully applied is own substantive law to impose an improper tax on the federal contractor that the United States was obligated to pay and has paid. As other courts consistently have held, the fact that state law, rather than federal law, was violated in the erroneous state tax assessment "does not change the nature of the cause of action [for money had and received] or limit the United States to state causes of action for this refund of taxes." *United States* v. *Broward County*, 901 F.2d at 1008. See Pet. Br. 24-25; note 6, *supra*.

2. The amici additionally contend (Am. States Br. 8-17) that various federal doctrines that bar or limit private challenges to state taxes in federal courts should apply to actions brought by the United States

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[10] "Am. Council Br." refers to the brief filed by the Council of State Governments, *et al.*

as well. But the federal rules to which amici refer are inapplicable to the claims of the United States.

a. Amici first refer (Am. States Br. 8-9) to the Tax Injunction Act, which generally prohibits federal courts from enjoining the assessment or collection of state taxes (28 U.S.C. 1341). As the cases cited by amici reflect, this statute concerns equitable actions brought by private parties to enjoin state taxes in federal courts. Neither the words of the statute nor the "policies underlying [it]" (Am. States Br. 9) bar an action at law by the United States to recover its own funds as damages under the federal cause of action for money had and received. See *Department of Employment* v. *United States*, 385 U.S. 355, 357-358 (1966); *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-350.[11]

b. Amici also err in contending (Am. States Br. 11-13; Am. Council Br. 9-14) that the doctrine of exhaustion of remedies is applicable to the federal common law action for recovery of unlawful state

[11] In *Board of County Comm'rs*, the Court upheld an award of damages against the State for an illegal tax challenged in a suit brought by the United States. See 308 U.S. at 348-349. That case was decided by the Court two years after enactment of the Tax Injunction Act which, as the Court stated in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943), merely recognized "and gave sanction" to the preexisting practice of federal courts to withhold injunctive relief when adequate legal remedies were available under state law (*id.* at 298-299). Amici plainly err in suggesting (Am. States Br. 10) that the *Great Lakes* decision—which applied the same judicial practice to requests for declaratory relief as the courts previously had applied to requests for injunctive relief—supports their suggestion that a damages remedy is unavailable to the United States for the recovery of unlawful state taxes.

taxes by the United States. In suits by private parties challenging state taxes as violating federal constitutional or statutory requirements, private litigants ordinarily are required first to exhaust their available state-law remedies. See, *e.g.*, *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100, 109 (1981); *First Nat'l Bank* v. *Board of County Comm'rs*, 264 U.S. 450, 455 (1924). But no case has held that the United States must first resort to state agencies or tribunals to perfect its right to obtain an adjudication of its federal cause of action.[12] The principles of comity and of judicial economy that form the basis of the exhaustion doctrine have no application to suits brought by the United States—suits over which the federal district courts have plenary jurisdiction under 28 U.S.C. 1345.

[12] Amici contend (Am. Council Br. 10) that exhaustion of administrative remedies is a traditional element of the common law cause of action for money had and received. The cases on which amici rely do not support that proposition. The decisions in *City of Philadelphia* v. *Collector*, 72 U.S. (5 Wall.) 720, 732 (1866), and *Elliot* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 153 (1836), describe the necessity for protesting a tax to the collector at the time it is paid as a precondition of thereafter maintaining an action for money had and received against the collector personally. The function of such a protest, as the Court noted, is to place the collector on notice of the taxpayer's claim *before* the collector relinquishes control of the payment to the taxing authority. This common law rule allowed the collector to protect himself against, and satisfy, any judgment thereafter rendered against him for collection of the unlawful tax. 72 U.S. (5 Wall.) at 731-732; 35 U.S. (10 Pet.) at 155-156. See also *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 266 (1839). That requirement has no relation to the doctrine of exhaustion of administrative remedies. See Pet. Br. 15 n.7.

If, as amici suggest (Am. Council Br. 14), a central purpose of the exhaustion doctrine is to allow the State's taxing authority an opportunity to reconsider its imposition of the tax, the State obviously remains free to do so during the course of the proceedings commenced by the United States in federal district court. And the fact that "issues of state tax law are present" in this case does not support amici's claim that the federal district courts should "defer[] to state decision makers" (*id.* at 13) in adjudicating the claim of the United States. Federal district courts routinely decide questions of state law, both in diversity cases and in other cases involving mixed state and federal law issues. The federal courts are unquestionably competent to determine questions of state law in suits brought by the United States for the recovery of its funds. See, *e.g.*, *Board of County Comm'rs* v. *United States*, 308 U.S. at 349-351.

The federal cause of action for money had and received ultimately turns on whether the State's retention of federal funds is wrongful or illegal. See *United States* v. *Wurts*, 303 U.S. at 415. The unlawful collection and retention of taxes by the State represents a classic example of "unjust enrichment of the state" (*United States* v. *Michigan*, 851 F.2d at 810) which the United States may recover under this federal cause of action. The fact that *additional* state-law remedies *might*, in some circumstances, be available to the United States cannot preempt or negate the federal cause of action. The State's administrative claim filing requirement and its 90-day suit commencement requirement are precisely the type of state-law restrictions that "have no applicability to suits by the Government" to recover its own funds (*Board of County Comm'rs* v. *United States*, 308 U.S. at 351).

In any event, as we point out in our opening brief (Pet. Br. 26), California (along with many other States) allows only the putative taxpayer, and not third parties, to file an administrative refund claim. Respondents do not seriously dispute that the United States had no right under the State's procedures to seek administrative adjustment of the tax assessed by the State on WBEC.[13] Respondents therefore do not join in (or even mention) the evidently hypothetical assertion of the amici that the United States should be required to exhaust non-existent state administrative remedies as a condition precedent to maintaining its federal cause of action for money had and received.[14]

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[13] Respondents suggest, without supporting citation, that the United States, as a "subrogee," should be able to "step into the shoes of the federal contractor" (Resp. Br. 21 n.8). In making that vague and unsupported assertion, respondents do not address the California decisions that deny standing to third parties who seek to challenge state tax assessments. The only exception that the state courts have found to this strict standing requirement is in the limited circumstance, not applicable here, when the putative taxpayer itself "lack[s] a remedy" before the state agency. *State Board of Equalization* v. *Superior Court*, 111 Cal. App. 3d 568, 571 (1980), citing *Javor* v. *State Board of Equalization*, 527 P.2d 1153 (Cal. 1974). Moreover, resort to the state administrative process by the United States would unquestionably have been futile in this case, for the identical administrative claim filed by the federal contractor, concerning the same transactions and raising the same legal objections, was rejected by the state agency. See Pet. Br. 6.

[14] Amici claim that the federal cause of action for money had and received results in inappropriate discrimination "in favor of federal contractors and against state contractors by granting federal contractors *greater* rights than offered other

3. Respondents assert (Resp. Br. 12-21) (i) that the United States has no independent federal cause of action to recover unlawful state taxes and (ii) the United States is therefore merely subrogated to the state-law tax refund claim possessed by the federal contractor, a claim that is now barred by the state-law statute of limitations. As we have shown, the initial premise of these contentions is incorrect. The right of the United States to proceed under federal common law to recover federal funds unlawfully in the possession of others is an independent and "long-established right" (*United States* v. *Wurts*, 303 U.S. at 416). Federal law, not state law, creates the right of the United States to recover its funds and establishes the limitations on the exercise of that right. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); Pet. Br. 19-25. The courts consistently have held that the United States may proceed directly, in its own right, to recover federal funds paid by federal contractors to satisfy unlawful state tax assessments. See Pet. Br. 17 (citing cases).

It is undisputed that the six-year federal statute of limitations that applies to this federal cause of action was satisfied in this case. The fact that a state-law tax refund suit may be time-barred by the State's statute of limitations is, quite simply, not relevant to the maintenance of the federal cause of action:

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taxpayers" (Am. States Br. 17). This misconceives the nature of the federal remedy. The federal cause of action for money had and received authorizes the *United States*, not federal contractors, to bring suit to recover unlawfully obtained federal funds. See *United States* v. *Wurts*, 303 U.S. at 415-416. Federal contractors have no right to invoke the remedy and are thus not a favored class.

> It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.

United States v. *Summerlin*, 310 U.S. at 416.

Amici thus err in stating (Am. Council Br. 22) that this case presents the question whether the six-year statute of limitations in 28 U.S.C. 2415(a)—which governs actions brought by the United States upon contracts implied in law—"preempts" the California statute which requires a state-law tax refund suit to be commenced within 90 days after denial of an administrative refund claim (Cal. Rev. & Tax. Code § 6933). The "preemption" question raised by amici is spurious. The federal statute of limitations applies, by its terms, to the federal quasi-contractual cause of action brought by the United States; the state statute of limitations applies, by its terms, to the state tax refund cause of action. Both statutes remain effective. The state statute is not preempted; it is simply not applicable to the federal claim. See, *e.g.*, *United States* v. *Summerlin*, 310 U.S. at 416; *Board of County Comm'rs* v. *United States*, 308 U.S. at 351.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JANUARY 1993

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